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UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER

FOUNDED 1851

Published Monthly (Except July, August and September) by The Department of Law
of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 59

OCTOBER

NUMBER 1

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NOTES

EQUITY REGARDS ADMINISTRATOR OF THIEF AS CONSTRUCTIVE TRUSTEE UNDER CERTAIN STATES OF FACT.

In a recent case decided by the Court of Appeals of the State of New York, that court took a very comprehensive view of the jurisdiction of a court of equity over constructive trustees. *Lightfoot v. Davis*, 91 N. E. 582 (1910).

In that case, the action was brought to recover the value of certain school bonds, aggregating in amount the sum of \$4000, alleged to have been converted by the defendant's intestate on or about March 18, 1875. The facts, as found by the referee, were briefly as follows: Intestate, who was the father-in-law of the plaintiff, and who at the time of the larceny was resident in the household of the plaintiff, broke open during plaintiff's absence the bureau drawer in which the plaintiff kept the bonds in question and purloined them, together with a memo-

random stating the numbers and other details of the bonds. This memorandum, being the only record of the bond numbers, the plaintiff was unable to stop their payment or to trace them, although he made every effort so to do. No suspicion attached to the deceased during his life. Deceased, who was a banker, and through whom the plaintiff had bought the bonds, offered to assist the plaintiff to stop payment. The bonds matured within a few years and the interest, as it accrued, and the principal was collected by the deceased and mixed with his own estate, so that the plaintiff was not able to trace it into any specific property of the deceased. Upon the death of the intestate in 1899 there was found among his papers the memorandum aforesaid, and an examination of his books showed that he had collected the bonds. Upon the discovery of these facts, the plaintiff brought this suit against the defendant as administrator with the will annexed. The relief prayed for was an accounting and paying over of the principal and income, if it can be traced, and "if it cannot be traced, that he may have judgment against the defendant as administrator for the sum of \$16,000." The defence was the Statute of Limitations.

The Appellate Division of the Supreme Court in May, 1909,¹ reversed a judgment of the referee in favor of the plaintiff. The principal case reverses the judgment of the Appellate Division.

The Court of Appeals rested its decision upon three main points. The first was that the deceased, being a thief, obtained no title to the bonds, their proceeds, or income by reason of the larceny and his subsequent concealment of them. It said, "If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and I think that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public and notorious. Where a person obtains possession of property secretly by common-law larceny, and conceals that possession, no lapse of time should confer title on the thief. The contrary doctrine seems to me shocking both in morals and to common sense. Had the bonds remained in the possession of the defendant's testator, the plaintiff, on discovering that fact, might have recovered possession of them by legal process."²

That the adverse possession in order to create a good legal title in the possessor must be open and notorious, seems open to no serious doubt. It seems to be the general rule, however,

¹ 132 N. Y. Sup. Ct. (App. Div.) 452 (1909).

² Principal case at p. 584.

that the actual, visible, notorious, hostile, exclusive, continuous and uninterrupted possession of land for twenty-one years under a claim of ownership, whether the original entry was with or without color of right, creates a perfect title sufficient not only to support a defence, but to support a recovery in ejectment,³ unless, of course, color of title is expressly or by clear implication required by the Statute of Limitation.

In *Ege v. Medlar* (Pa.)⁴ it is said: "An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another." * * * "It is not to be forgotten that mere color of title is valuable only so far as it indicates the extent of the disseisor's claim; if it fails in this, it fails altogether."⁵

In Missouri it has been held that one taking possession of land without legal or equitable right thereto is a trespasser, but his possession, if continued a sufficient length of time, may, under certain circumstances, ripen into a legal title, although an equitable right can never be developed out of a wrongful act because of the long continuance of the wrong.⁶ But if his possession of the land was originally in accord with or in subservience to the true title, the burden is upon him to fix the time at which he began to hold adversely to the true owner.⁷

Assuming that the acquisition of title to chattels by adverse possession is governed by the same rules and principles as the like acquisition of title to land, it is apparent from the foregoing that the title of the decedent was defective—not necessarily because it was under no color of title, for by the general rule that is not necessary to the acquisition of title by adverse possession—but because the possession of the decedent was not open, visible, and notorious.

The second ground, upon which the Court based its opinion, deals with the Statute of Limitations. The Court decided (1) that while the statute may bar the remedy, it does not cancel the debt; (2) that since the thief had not acquired title by adverse possession, the title remained in the plaintiff, who is, therefore, not barred from maintaining legal proceedings to recover possession of it; (3) that, although an action of conversion for the

³ *Mead v. Leffingwell*, 183 Pa. 187 (1876), at p. 191, top, opinion by Woodward, J. See also cases cited in 1 Cyc. 1084 (Adverse Possession) foot-note 77. Compare, however, *Vorhees v. Incorporated Bank of Ackley*, 127 Iowa 658 (1905), at p. 661, top.

⁴ 82 Pa. 86 (1876).

⁵ *Ege v. Medlar*, (*supra*) at p. 99 (top).

⁶ *Smith v. McCorkle*, 105 Mo. 135 (1891).

⁷ *Hunninwell v. Adams*, 153 Mo. 440 (1900).

actual taking was barred by the statute, plaintiff still has open to him his equitable remedy against the defendant as constructive trustee, because under the present Code an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that at law, may be brought at any time within six years after the discovery of the fraud, and (4) that the fact that the ultimate relief sought was a money judgment did not take it out of the statute.

The third ground, and the one on which the Court rested its power to give a money judgment, may be best expressed in the exact words of the Court: "In cases like the one before us there are two distinct elements of fraud. First, the original larceny; second, the subsequent concealment of the stolen property and of its sale and the receipt of its proceeds. Assuming (but only for the argument) that under the first no bill in equity could be maintained, I think the second affords a good ground for the interposition of equity, and, as already stated, that though the plaintiff failed to identify in the estate of the deceased the proceeds of his bonds, he was still entitled to what would be a personal judgment were the original wrongdoer still living; for in equity it is the general rule that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial."^a

It should be noted that there was no fiduciary relation existing between the deceased and plaintiff at the time of the larceny of the bonds, and that none arose thereafter, unless a constructive trust arose in favor of plaintiff by reason of the decedent's act in stealing the bonds and converting their income, as well as their proceeds, to his own use. The general rule seems to be that equity will only take jurisdiction to decree the return of property, wrongfully in the possession of another, to the true owner when the property so held is of peculiar value and not readily duplicable on the market. It may also be regarded as settled that while a court of equity will not interfere to restrain a crime where there is an adequate remedy at law—unless possibly in the exceptional case of a threatened breach of the peace, where the public officials charged with the duty of preventing the same are either powerless to do their duty or refuse to do it. If, however, there is a good ground of equitable jurisdiction, the jurisdiction is not defeated merely because the acts sought to be relieved against are also a breach of the law.

Mr. Pomeroy lays down the rule that when instruments have

^a Principal case, at p. 586 (col. 1), at bottom.

been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party.⁹

A careful perusal of the opinion will convince the reader that the Court was especially desirous not to close up the only practicable avenue for the recovery of long-term securities stolen in the numerous bank robberies during the last thirty years. In the words of the Court, "These securities are often, if not generally, long-time bonds not maturing until after the expiration of the six-year statutory period for bringing action for conversion." Having this in mind, it is not necessary to assume that the Court meant to hold that any suppression by a thief of property stolen by him would render him or his estate liable in equity. The principal case on its facts extends only to the case where a written instrument, under seal, and for whose recovery the remedy at law is not really adequate, has been fraudulently suppressed.

I. T. P.

CRUEL AND UNUSUAL PUNISHMENT.

'An interesting discussion as to what constitutes "cruel and unusual punishment" under the Eighth Amendment of the Constitution is to be found in the recent case of *Weems v. United States*.¹

The defendant, a duly appointed officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a public and official document, by fraudulently entering as paid "As wages of employes * * * of the United States Government of the Philippine Islands" of 204 pesos on one occasion, and 408 pesos on another occasion. The following sentence was imposed upon him: "To the penalty of fifteen years of cadena, together with the accessories of Section 56 of the Penal Code, and to pay a fine of 4000 pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

It was contended that the "punishment of fifteen years' imprisonment was a cruel and unusual punishment," infringing the Bill of Rights of the Islands, and entirely disproportionate to the offense for which the defendant was convicted.

⁹ 2 Pom. Eq. Jur., 3rd ed., p. 1654, section 919.

¹ 30 U. S. Supreme Court Reporter, 544.